

BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA

IN THE MATTER OF:

	)	Administrative Cause
DEER CREEK IDLE ZONE	)	Number 08-094L
	)	(LSA Document # 09-210(F))

**REPORT OF PUBLIC HEARING AND COMMENTS,  
AND RECOMMENDATION REGARDING FINAL ADOPTION**

**1. RULE PROCESSING**

The rule proposed in this package resulted from the Department's consideration of a Petition for Rule Change that was received from Mark Newton in May 2008. Mr. Newton sought the establishment of idle zones on Deer Creek and Little Deer Creek in Cannelton, Indiana to address safety concerns and address streambank erosion. Mr. Newton's Petition was processed in accordance with the Natural Resources Commission's Information Bulletin #7 (Second Amendment) (*hereinafter referred to as "IB 7"*) posted to the Indiana Register database website, as 20080206-IR-312080059NRA, on February 6, 2008. In accordance with IB 7, the Department of Natural Resources (*Department*) Director, Robert E. Carter, Jr., appointed a Committee to evaluate the merits of the Petition. Committee members were Major Felix Hensley, Law Enforcement Division, Brian Schoenung, Division of Fish and Wildlife and James Hebenstreit, Division of Water, Major Hensley served as the Committee's chairperson.

On January 14, 2009, Major Hensley submitted the Committee's report, attached as Exhibit A, to Director Carter. The Committee determined that under 312 IAC 5-7-6 there presently exists a 300 foot idle zone on Little Deer Creek and a 600 foot idle zone on Deer Creek, with the remainder of both creeks having an established speed limit of 20 miles per hour. Newton's property, and the property of several other residents interested in this matter, is located adjacent to the Creek where the 20 mile per hour speed limit exists. Many of the residents maintain docks within the Creek with some of the dock

being floating docks and others being affixed to posts driven into the Creek's bed. Mr. Newton and other area residents complained particularly about participants in bass tournaments that occur each week during the boating season explaining that the 20 mile per hour speed limit was often violated and that even the wake from the boats complying with the 20 mile per hour speed limit were sufficiently forceful to make it unsafe for children to be on their own family docks.

During the review of Mr. Newton's petition, Major Hensley toured the area and observed the existence of shoreline erosion but "did not see eroded areas that he could directly attribute to excessive boat speed. The majority of shoreline erosion was on the outside bends of both creeks, which is normal on flowing waters, especially in areas that are prone to high water and flash floods."

Major Hensley's review also involved a visit to the area during a bass tournament. During this visit, Major Hensley positioned himself so he could observe the tournament participants but not be seen by them. On this occasion, Major Hensley observed tournament participants violating the 20 mile per hour speed limit and decided that an increased law enforcement presence was necessary during tournament days to enforce the existing speed limit.

However, Major Hensley also believed it was important to evaluate the wake cause by a boat that was traveling at the 20 mile per hour limit because the residents stated that even at 20 mile per hour the wakes resulted in unsafe conditions. Based upon his first hand observation Major Hensley concluded that the wake caused by a boat traveling 20 miles per hour "very well could have caused minor damage to boats moored to the docks in the area. The property owner's claim, that their children could not be on the floating docks as boats went past at 20 mph was verified...".

Following its consideration of Mr. Newton's Petition, the Committee could not justify implementing an idle zone for the entirety of Deer Creek and Little Deer Creek. However, the Committee did recommend that the existing 600 foot idle zone on Deer Creek be extended to 2,500 feet from the confluence with Little Deer Creek and that the

existing 300 foot idle zone on Little Deer Creek by extended to 2,500 feet from the confluence with Deer Creek.

Director Carter approved the committee's report and recommendation on January 14, 2009.

The Natural Resources Commission (*NRC*) gave preliminary adoption to the rule package on March 17, 2009.

A "Notice of Intent" to adopt the proposed rule amendment was posted to the INDIANA REGISTER database website as 20090408-IR-312090210NIA on April 8, 2009. The notice identified Captain David Windsor, Department of Natural Resources, Division of Law Enforcement, as the "small business regulatory coordinator" for purposes of Indiana Code § 4-22-2-28.1.

A fiscal analysis was prepared in association with the proposed rule package. The Department determined that the fiscal impact of the proposed rule would be minimal and there would be no costs or requirements imposed upon any business, including those qualifying as "small businesses" pursuant to Indiana Code § 4-22-2.1 et seq. The fiscal analyses, a copy of the proposed rule language and a copy of the posted Notice of Intent were submitted to the Office of Management and Budget on April 13, 2009. In a letter dated July 8, 2009 Christopher A. Ruhl, Director, Office of Management and Budget, recommended that the proposed rule amendments be approved.

The NRC Division of Hearings submitted the rule proposal to the Legislative Services Agency (*LSA*) along with the "Statement Concerning Rules Affecting Small Business" on July 24, 2009. The Notice of Public Hearing was submitted to LSA on July 24, 2009. The Notice of Public Hearing, along with the Economic Impact Statement and the text of the proposed rule was posted to the INDIANA REGISTER database website on August 5, 2009. Following receipt of an "Authorization to Proceed" from LSA on July 24, 2009, the NRC Division of Hearings also caused a Notice of Public Hearing to be published by the *Indianapolis Newspapers*, a newspaper of general circulation in Marion County

Indiana, on August 20, 2009 and in the *Perry County News*, a newspaper of general circulation in Perry County, Indiana, on August 20, 2009. In addition, notice of the public hearing and a summary of the proposed rule changes were published on the Commission's web-based electronic calendar.

## **2. REPORT OF PUBLIC HEARING AND COMMENTS**

### **a) Public Hearing Comments**

A public hearing was held on October 1, 2009 at 1:30 p.m. at the Cannelton Public Library – City Hall, 210 South 8<sup>th</sup> Street, Suite 2, Cannelton, Indiana. Sandra Jensen, Hearing Officer, Captain David Windsor and Conservation Officer Joe Lackey attended. Nine members of the public appeared to offer comments. The public comments are summarized as follows:

#### **Mark Newton, Cannelton, IN**

I'm the one who filed the citizen's petition. I think everyone is going to tell you pretty much the same thing. There is an erosion problem caused by the wake from boats. Then another issue is the safety factor of the boats speeding up and down both Little and Big Deer Creeks. The erosion problem is a major concern. I've owned my place since 2002 and since that time I've lost approximately 2 feet of land and more in some places.

#### **Ken Childers, Cannelton, IN**

I would like to thank you for your time on this, it is something that is very important to us. Childers totally agreed with Mark Newton, especially on the safety factor. I have two young kids and we have a floating dock that they can't even sit on and fish because when boats come by the wake is so bad. Childers inquired about the difference between the "no wake" zone that the residents requested and the term "idle speed" that is used within the proposed rule. The hearing officer, with the assistance of Officer Lackey and Captain David Windsor, noted that it is physically impossible for a boat to travel through the water slow enough to produce absolutely no wake. The term "idle speed" is defined as "the slowest possible speed, not to exceed five miles per hour, so as to maintain steerage and produce minimal wake."

#### **Tom Franchville, Cannelton, IN**

Inquired with respect to Big Deer Creek, where the point 2,500 feet upstream of the confluence with Little Deer Creek would be located. Officer Lackey explained that the idle zone will "go around the bend" from Franchville's property. He expressed his concern is that if the location is at the "point", I'll end up with more wake than I have right now. Franchville, discussing the matter with Officer Lackey, who is familiar with the area, stated that if you go past my house and make the first bend past my house, then

there's a second bend before you get to the "stick-ups". If it goes that far, Franchville believed it would be acceptable, otherwise he believed it will simply cause more erosion on his property. Officer Lackey stated that he did not believe the idle zone would go that far.

The hearing officer referred members of the public to the map attached to Major Hensley's report dated January 14, 2009. Based upon the point depicted on the map, Franchville stated, "I will be the one who opposes this thing." Franchville's concern is that the point between the existing 20 mile per hour limit and the proposed idle zone will be right at his house. He stated that there is "tremendous" erosion and because this will be the area where boaters will "hammer down" and also be the area where boaters will quickly decrease speed, this area will experience an increase in wake and wash action associated with boating.

Franchville stated that there are no reasons why there should be anything other than idle zone up Big or Little Deer Creek. From a safety standpoint, if you fish in your boat and a boat comes around one of the corners at the speeds they travel, if you would be standing up to change seats you would be knocked out of the boat. He expressed that this was made clear at a meeting the residents had with Major Hensley and they believed the entire area, up to the "stick-ups" would be incorporated into the idle zone. He noted that the "stick-ups" is a self regulated low speed area due to the fact that the water is full of sticks, stumps and other similar debris. The hearing officer noted that while Major Hensley probably understood what they residents wanted, it is not the wishes of the adjoining landowners that controls these decisions. While property owners' property rights as it relates to erosion is a consideration Major Hensley's task is to balance the needs of the owners with the rights and needs of the general public.

**Ken Childers, Cannelton, IN**

Offered an additional comment expressing his agreement with Franchville's opinion that this rule, as proposed, will be more harmful to the residents than the existing situation. He inquired about whether it was possible to terminate the processing of this rule. The hearing officer explained that the Commission did have the authority to withdraw a rule.

He added, "I feel terrible because we did ask for this and it is so close to exactly what we need to solved all of our problems." However, he stated that based upon where the point is between the 20 mile per hour limit and the idle zone he remains concerned that the wake from boats "hammering down" will continue to prevent his children from safely fishing off his own dock. Childers expressed his opinion that if the new idle zone had added 2,500 feet onto the existing 600 foot idle zone it would probably have been sufficient. (Others in attendance expressed their disagreement that even 3,100 feet of idle zone would be sufficient.)

**Beverly Kress, Cannelton, IN**

Expressed concern about their residence being put "smack dab in the hammer lane." She stated that she has experienced being knocked down in her boat while it is being docked.

**Joseph Kress, Cannelton, IN**

Inquired as to whether the map attached to Felix's report is "to scale" for purposes of the written comments and the ability to show where they believe the idle zone limit should be to address safety and erosion concerns. The hearing officer noted that the map was taken off of Google Maps and Dave Windsor noted that Google maps are typically close to scale.

**David Galarden, Cannelton, IN**

Stated his agreement with the concerns raised by others.

**Tom Backer, Cannelton, IN**

Stated that he echoed the comments of others in attendance.

After the final public comment had been received, the hearing officer advised those in attendance that she would be aided significantly by having the residents express their opinions about how the length of this proposed idle zone should be revised. She also noted to those in attendance that any revisions to the proposed rule language must be based on a written comment and announced that the public comment period would remain open until Friday, October 9, 2009.

**b) Comments Received Outside Public Hearing**

Three written comments were received after the public hearing was concluded. These comments have been included as follows:

**Tom Franchville, Cannelton, IN**

First I would like to thank everyone from the DNR who have given their time and effort to address the concerns of local citizens, landowners, and recreationalist of all types concerning watercraft speed limits on Deer Creek in Perry County. I will address several items in Major Hensley's memorandum to Director Carter dated 1-14-09 as well as the hearing held October 1, 2009 at the Cannelton Library. On July 15, 2008 when Major Hensley met with local residents and landowners he mentions that safety was the number one concern. While that is true, excessive land erosion was also identified as a major concern of all the landowners as well. He states that the majority of shoreline erosion was on the outside bends of both creeks, which is normal on flowing waters. This is simply not the case, heavy erosion has taken place at my neighbors' home across the bay from me and it is not on any bend. My home sits on the peninsula where Major Hensley is suggesting beginning the 20mph speed zone and it certainly isn't in a bend. If on 8-7-08 Major Hensley would have noticed the color of the water when they arrived and then stayed until Sunday evening when boating traffic subsided they would have seen the clear water on a Friday turn into a mud laden creek in a matter of 2 days. I believe that F/Sgt Schuetter and Officer Lackey can attest to this statement. They have seen many times what heavy weekend boat traffic does to the banks and water. My peninsula is on a

straight stretch of the creek and is not on the outside bend as Major Hensley describes. I have spent over \$50,000 trying to protect that bank from erosion from the excessive speeds and wake of watercraft. Major Hensley states that while they were monitoring activity that the wake of boats at 20mph very well could damage docks. Then you must agree that if we are damaging docks at that speed then we certainly are causing erosion. There are building lots being sold farther up the creek and homes are being built with docks. This issue is going to grow even larger with homes and more recreation in that area. If we are only going to address the safety issue then there is also much more to be concerned about then just the folks who have docks. As Major Hensley addresses in his write-up, when they were monitoring activity on the creek, that many boats ran 20mph or much faster. I have sat on my porch and watched two speeding boats nearly collide at the corner just up from my property. When those boats come around corners at that speed any fisherman or other boater is in harms way. I personally have had close calls while fishing or simply idling on the creek and a boat slashes around the corner. There are simply not enough acres of water to allow speeding boats on. I asked at our meeting on July 15, 2008 why the lakes in northern Perry County such as Celina and Indian had trolling motor only limits. The obvious reason is because of bank erosion and safety. Those lakes have similar or more navigatable water then Little Deer Creek. I would ask that we take that into consideration when considering limit and treat areas of water with consistency in rules. Surely our banks and property are as valuable to us as those are to the government. As asked in the petition, I once again plead with you, for the safety and erosion problems, that all of Little Deer Creek be made an idle zone. I adamantly oppose, as do my fellow neighbors and landowners, the current proposal of starting the 20mph zone at 2500 ft. from the beginning of Little Deer. I believe this was certainly evident at the hearing in Cannelton on October 1<sup>st</sup>. This will certainly create more erosion problems even than what we have now and do little for the safety issue. The safety issue on the docks is only one part of the big safety picture. It also should be noted that apparently there was no opposition to the idle zone as no one showed up at the hearing to oppose it. I believe that even those speeding now on the creeks understand the safety and erosion aspect of what the current laws are allowing, hence the no show of opposition. Thank you once again for your time and concern for all the citizens. Sincerely

**Joe and Bev Kress, Cannelton, IN**

We suggest the idle zone on Little Deer Creek should extend at least thirty five hundred (3500) feet upstream from the State Road 66 bridge for reasons expressed at the local meeting. Thank you for your consideration in this matter.

**Mark A. Newton, Cannelton, IN**

Attached is my letter regarding the above-referenced petition. Please let me know if you have any questions or need something further.

This is in response to the hearing conducted on October 1, 2009 and the written recommendation of Major Felix Hensley. The hearing was very informative and my personal opinion is that the idle zone proposed on Little Deer Creek is not extended far enough. After looking at the map in Major Hensley's report, not only myself, but all the landowners believe it should be lengthened. Even Conservation Officer Lackey

expressed his concerns and thought that the idle zone should be extended past where Hensley recommended. After reading Hensley's report, I agree with Officer Lackey.

I disagree with Major Hensley regarding his view of the erosion issue. He states that he did not see erosion problems that could be attributed directly to boats traveling at greater than idle speed. As quoted by Major Hensley "The area appeared to have erosion typically expected on an Ohio River tributary". In my opinion, Major Hensley is not qualified nor Sgt. Schuetter to say what is natural erosion or erosion from boat wake. What I do know, is when boats come through and they can turn the water brown two feet out from the shore, that this is not natural erosion. This happens about every fifteen minutes during a tournament. I am very sure that if you and members of the hearing commission and Major Hensley could observe one weekend when there is a large tournament, you all would feel the same.

You have heard our concerns. I know you are under a time restraint, but we have been waiting now for over one (1) year for something to be done. It would be very nice to have idle zone before the next boating season. You stated that someone might object to the idle zone that is proposed and that the landowners don't have all the say. I feel we pay the high property taxes even on the land that the water is on. So who cares if a person fishing gets to their spot 10 seconds early.

The safety of the tournament boaters, recreational boaters, including people in kayaks and canoes, which are becoming more numerous, should be of the utmost concern and the erosion issue as well. In my opinion, there is not a significant amount of erosion from high water, (as Hensley states) as the high water raises and lowers at a slower pace. The wake from boats is what is eroding the banks.

I respectfully request that DNR do the right thing and extend the proposed idle zone for the safety of all boaters and landowners. Thank you and the Hearing Committee, Major Hensley and Officer Lackey for all the time you have spent on this matter. If you have any questions contact me at (812) 719-1227 or at [newton2491@sbcglobal.net](mailto:newton2491@sbcglobal.net).

**c) Response by the Department of Natural Resources**

On October 22, 2009, Major Hensley submitted the following written response to the public comments:

**INDIANA DEPARTMENT OF NATURAL RESOURCES  
LAW ENFORCEMENT DIVISION**

**MEMORANDUM**

**DATE: 10-22-09**

**TO: Sandra Jensen**

**FROM: Major Felix Hensley**



**SUBJECT: Response to Comments from Public Hearing on Little Deer Creek Petition**

**APPROVED BY: \_\_\_\_\_**

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Major Hensley was unable to attend the public hearing on the Little Deer Creek Petition which was held in Cannelton Indiana on October 1<sup>st</sup> 2009, he has now reviewed the citizen's comments from the meeting.

The reviewing committee feels it is very important for everyone involved in the petition process to understand the role of the committee. The committee members have to consider public safety, the rights of the landowners and balance those rights with the public trust, the public's right to use a public waterway without being unduly restricted. These factors must be considered in forming a recommendation.

In the initial recommendation Major Hensley stated "While touring the area Major Hensley did not see eroded areas that he could directly attribute to excessive boat speed. The majority of the shoreline erosion was on the outside bends of both creeks, which is normal on flowing waters, especially in areas that are prone to high water and flash floods". The committee still feels this is a valid assessment of the area.

The reviewing committee understands that any wave action from boats may displace some sediment and soil and agree that may be occurring to some degree, but the committee disagrees that is the major cause of erosion in the area. Evidence to support this was brought to Major Hensley's attention by some of the residents in the area when they voiced concern over the erosion taking place at a state highway bridge crossing Deer Creek. The bridge is located within the existing idle zone established when the current rule was enacted and is not subjected to boats traveling at greater than idle speed. Currently, all areas outside of the existing idle zones on Little Deer Creek and Deer Creek are 20 mph.

During the public hearing residents on Little Deer Creek voiced concern the proposed idle zone would not address their concerns. They feared that the proposed idle zone would create additional safety and erosion concerns from the "hammering down" of boats as they enter and exit the proposed idle zone. One resident's home is located on a peninsula in Little Deer Creek and he feared the proposed idle zone would increase the erosion he was suffering. This resident voiced the desire that both Deer Creek and Little Deer Creek be limited to idle speed only for the entire distance.

The reviewing committee agrees to amend the original recommendation extending the proposed idle zone from 2500 feet to 3200 feet to help alleviate the area homeowner's concerns. This increase would extend the idle zone to the upstream side of the peninsula of the concerned resident. The committee feels any further extension of the

idle zone is not warranted at this time and would be unduly restrictive to the public and sportsmen's use of Little Deer Creek.

### Current Rule

#### **312 IAC 5-7-6 Deer Creek and its tributaries, Perry County**

Authority: IC 14-10-2-4; IC 14-11-2-1; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14

Sec. 6. (a) A person must not operate a watercraft on Deer Creek or its tributaries in Perry County in excess of twenty (20) miles per hour.

(b) In addition to the restrictions established under subsection (a), a person must not operate a watercraft in excess of idle speed:

(1) on Deer Creek:

(A) from its mouth on the Ohio River to buoys placed six hundred (600) feet upstream from the confluence of Deer

Creek with Little Deer Creek; or

(B) between buoys placed three hundred (300) feet downstream and three hundred (300) feet upstream of the State Road

66 bridge in section 5, township 7 south, range 2 west; and

(2) on Little Deer Creek to buoys placed three hundred (300) feet upstream from the confluence of Deer Creek with Little Deer Creek.

*(Natural Resources Commission; 312 IAC 5-7-6; filed Mar 23, 2001, 2:50 p.m.: 24 IR 2375, eff Jan 1, 2002; readopted filed May 29, 2008, 1:53 p.m.: 20080625-IR-312080057RFA*

### Original Proposed Rule Change Recommendation

#### **312 IAC 5-7-6 Deer Creek and its tributaries, Perry County**

Authority: IC 14-10-2-4; IC 14-11-2-1; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14

Sec. 6. (a) A person must not operate a watercraft on Deer Creek or its tributaries in Perry County in excess of twenty (20) miles per hour.

(b) In addition to the restrictions established under subsection (a), a person must not operate a watercraft in excess of idle speed:

(1) on Deer Creek:

(A) from its mouth on the Ohio River to buoys placed **twenty five hundred feet (2500)** upstream from the confluence of Deer

Creek with Little Deer Creek; to a point at **(UTM 4197262.1 North) (SPC 974300.7 North)** and **(UTM 529318.5 East) ( SPC 3073012.8 East)**, or

(B) between buoys placed three hundred (300) feet downstream and three hundred (300) feet upstream of the State Road

66 bridge in section 5, township 7 south, range 2 west; and  
(2) on Little Deer Creek to buoys placed **twenty five hundred feet (2500)** upstream from the confluence of Deer Creek with Little Deer Creek at a point at **(UTM 4197178.0 North) (SPC 974022.4 North)** and **(UTM 528463.5 East) (SPC 3070206.8)**

### **Amended Proposed Rule Change Recommendation**

#### **312 IAC 5-7-6 Deer Creek and its tributaries, Perry County**

Authority: IC 14-10-2-4; IC 14-11-2-1; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14

Sec. 6. (a) A person must not operate a watercraft on Deer Creek or its tributaries in Perry County in excess of twenty (20) miles per hour.

(b) In addition to the restrictions established under subsection (a), a person must not operate a watercraft in excess of idle speed:

(1) on Deer Creek:

(A) from its mouth on the Ohio River to buoys placed **twenty five hundred feet (2500)** upstream from the confluence of Deer

Creek with Little Deer Creek; to a point at **(UTM 4197262.1 North) (SPC 974300.7 North)** and **(UTM 529318.5 East) (SPC 3073012.8 East)**, or

(B) between buoys placed three hundred (300) feet downstream and three hundred (300) feet upstream of the State Road

66 bridge in section 5, township 7 south, range 2 west; and

(2) on Little Deer Creek to buoys placed **thirty two hundred feet (3200)** upstream from the confluence of Deer Creek with Little Deer

Creek at a point at **(UTM 4197310.5 North) (SPC 974433.4 North)** and **(UTM 528218.8 East) (SPC 3069394.3 East)**

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A photograph depicting the idle zone as revised from the Committee's initial proposal of 2,500 feet to the revised proposal of 3,200 feet is attached as Exhibit B.

### **3. RECOMMENDATION**

The citizens' petition seeking the extension of the Deer Creek and Little Deer Creek idle zones was based upon public safety and erosion control. The Committee established to determine the merits of the citizens' petition conducted an extensive review of the petition and determined that there were safety issues associated with the wake from watercraft traveling at 20 miles per hour that could adequately be addressed by the extension of the idle zones.

To address the citizens' safety concerns, the Committee initially recommended that 312 IAC 5-7-6 be amended to extend the idle zones on both Deer Creek and Little Deer Creek to 2,500 feet from their confluences.

In reviewing the citizens' petitions, Major Hensley observed the area and noted that the visible erosion exists on the "outside bends of both creeks, which is normal on flowing waters, especially in areas that are prone to high water and flash floods." The Committee's response to the public comments further reflects that erosion is occurring at a state highway bridge that is located within the existing idle zone. Based upon these observations, it was the Committee's determination that the erosion occurring in the area is predominantly a result of water flow, not watercraft speed.

The public comments, including written comments, received from the citizen petitioners dispute the Committee's conclusion that the erosion in the area is a result of water flow and not boat speeds. These citizens also expressed concern that the idle zone on Little Deer Creek, as initially proposed by the Committee, is insufficient even to address their safety concerns. These comments express the opinion that the idle zone on Little Deer Creek should be extended beyond the 2,500 feet recommended by the Department's committee, to include the entirety of Little Deer Creek or at least 3,500 feet of its length.

Following receipt of the public comments, Major Hensley, and the Committee, conducted additional review of the petitioners' continued concerns. Major Hensley restates the Committee's continuing belief that boat speeds of 20 miles per hour are not the cause of the areas erosion. The Committee agreed that the idle zone on Little Deer Creek could be extended to 3,200 feet to address the residents' continuing safety concerns. The Committee concludes that "...any further extension of the idle zone is not warranted at this time and would be unduly restrictive to the public and sportsmen's use of Little Deer Creek.

**AGENDA ITEM #20**

It is the recommendation of the hearing officer that the Commission grant final adoption to the revised rule language set forth in Exhibit C. The rule, as revised, will extend the idle zone on Deer Creek from 600 feet to 2,500 feet from its confluence with Little Deer Creek and will extend the idle zone on Little Deer Creek from 300 feet to 3,200 feet from its confluence with Deer Creek.

Dated: October 26, 2009

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Sandra L. Jensen  
Hearing Officer

## Exhibit A

**INDIANA DEPARTMENT OF NATURAL RESOURCES  
LAW ENFORCEMENT DIVISION**

**MEMORANDUM**

**DATE:** 1-14-09

**TO:** Director Rob Carter

**FROM:** Major Felix Hensley

**SUBJECT:** Recommendation on Deer Creek Petition  
Administrative Cause 08-094L

**APPROVED BY:** \_\_\_\_\_

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Director Carter,

The Division of Hearings received a "Citizens Petition for Rule Change" from Mr. Mark Newton of 533 9<sup>th</sup> Street, Tell City Indiana. The petition explained that Mr. Newton also owns property at 7470 Swallow Road in Cannelton, Indiana which borders Little Deer Creek, a tributary to the Ohio River. Mr. Newton cited boating safety and extreme shoreline erosion as the motivating factors for filing the petition. Currently 312 IAC 5-7-6 establishes a 300 foot idle zone on Little Deer Creek and a 600 foot idle zone on Deer Creek, with the remainder of both creeks having a 20 mile per hour speed limit. Mr. Newton's property is located past the current idle zone on Little Deer Creek within the area designated as 20 mph.

On July 2, 2008 a committee was appointed by the Rob Carter, Director of the Department of Natural Resources to review and make recommendations pertaining to the petition. The committee consists of Jim Hebenstreit from the Division of Water, Brian Schoenung from the Division of Fish and Wildlife and Major Felix Hensley from the Division of Law Enforcement who serves as the committee chairman.

On July 3, 2008 Major Hensley contacted Mr. Newton by phone and advised him a committee had been formed to review his petition and make appropriate recommendations to the DNR Director. Mr. Newton explained the problems in the area stemmed from the number of Bass Tournaments held in the area, sometimes 2 or more per week. Mr. Newton stated there were sometimes as many as 15 to 20 tournament boats speeding on Little Deer Creek at the same time. He further stated they did not observe the 20 mile per hour speed limit. Mr. Newton stated the conduct of the tournament fishermen has lead to many verbal conflicts with the landowners in the area and he was very concerned the conflicts would escalate to physical violence if something was not done. Mr. Newton stated his wishes were to amend 312 IAC 5-7-6 by converting both waterways to idle speed only in an effort to alleviate these problems. Major Hensley made arrangements with Mr. Newton to view the area in question and meet with concerned property owners on the evening of July 15<sup>th</sup>.

On July 15<sup>th</sup>, Major Hensley met F/Sgt Phil Schuetter and Officer Joe Lackey where they toured both Deer Creek and Little Deer Creek by boat. At approximately 6 pm. Major Hensley met with the petitioner, Mark Newton, and other area residents and landowners.

The number one concern voiced by the residents was that of safety. Most of the complaints were centered on the fishing tournament contestants that fish Deer Creek and Little Deer Creek every week of the boating season. The residents indicated there may be well over 150 to 200 bass boats converging on the area during a BASS Federation tournament. Some of the residents suggested they felt the fishing tournaments should be banned on both waterways. They explained the wakes generated by the bass boats, even at 20 mph, were so forceful that their kids could not be in the water or on their docks. They stated it was not safe even for the adults to be on the water in canoes or kayaks. Major Hensley recommended they take photos or video unsafe conduct and we could pursue this. Major Hensley never received anything of this nature from the residents.

Some of the residents cited excessive erosion problems and water quality as justifications for changing the rule. While touring the area, Major Hensley did not see eroded areas that he could directly attribute to excessive boat speed. The majority of shoreline erosion was on the outside bends of both creeks, which is normal on flowing waters, especially in areas that are prone to high water and flash floods.

Several of the residents stated the conflicts between the tournament fishermen and residents were reaching a boiling point and they were afraid someone was going to get hurt. Major Hensley advised them during the petition review, that we, Law Enforcement Division, might be able to help with some of their issues. Major Hensley told them he would be glad to go to a meeting of the local bass clubs and discuss the situation with them and perhaps step up some law enforcement presence during the times scheduled for the tournaments. He further advised them that he would return to the area to view the conduct of the boaters during a tournament. F/Sgt Schuetter followed up on this by making contact with the president of the local Bass Club and discussing the situation.

It was obvious this is a very emotional issue for the landowners and probably just as emotional for the sportsmen and other recreational users of the waterways.

Major Hensley explained the process that a rule change requires and that much more work would have to be done before an informed recommendation on the petition could be made. Major Hensley gave them his contact information as well as that of the District F/SGT and local officer were present at the meeting.

On 8-7-08 Major Hensley met F/SGT Schuetter in Tell City and traveled to Deer Creek to observe a bass fishing tournament that was scheduled for this date. Major Hensley wanted to see first hand how the tournament contestants affected the conditions on Little Deer Creek and Deer Creek given comments made by property owners on 7-15-08.

Officers positioned themselves in an area where they would not be noticed, but could see boats as they passed the petitioners property. Officers witnessed five bass fishing boats enter the area within minutes of one another. One boat was in clear violation of the 20 mph speed limit while the other 4 appeared to be operating



in a legal fashion. Officers also observed 5 other fishing boats, but the occupants were engaged in fishing and were propelling the boats by electric trolling motors.

Officers maintained their position until the fishing boats were exiting the waterway near the petitioner's property, as check in time for the tournament approached. Officers noticed that some of the boats were operating after sunset without the navigational lights on their boats being activated. Again, there were boats clearly exceeding the 20 mph speed limit.

Major Hensley and F/SGT Schuetter discussed the matter and decided it was important for the area to receive as much law enforcement presence as possible during the tournament days, as some of the property owner's complaints had been verified. F/Sgt Schuetter assigned officers to the area during dates of tournaments for the remainder of the season.

Major Hensley felt it was very important to determine if the complaints aired by the property owners were the result of boaters disregarding existing regulations or if the 20 mph speed limit was not adequate for the area.

On 10-31-08 Major Hensley, with the assistance of F/SGT Schuetter, Lt. Farmer and Officer Lackey returned to the Little Deer Creek area. F/SGT Schuetter had arranged for a local fishing tournament participant to bring his boat to the area as well. It was Major Hensley's intent to use a radar unit to verify the speed of the bass boat and video the resulting wake and determine if there was truly a negative impact as the area property owners had described.

Officer Lackey positioned himself by boat in the channel of Little Deer Creek near the petitioner's property and prepared to verify the speed of the oncoming bass boat with a radar unit. The local fisherman then accelerated his boat to 20 mph, verified by radar, through the channel past the petitioner's docks. This was all captured on video by Lt. Farmer. The wake created by the boat was then videoed as it reached the docks.

An important factor to keep in mind is that some of the landowners in the area have floating docks while some have docks affixed to posts that have been driven into the creek bed.

The officers noticed that the wakes produced at 20 mph very well could have caused minor damage to boats moored to the docks in the area. The property owner's claim, that their children could not be on the floating docks as boats went past at 20 mph was verified in Major Hensley's opinion, however Major Hensley does not agree that limiting the entire waterway to idle speed is justified. Major Hensley feels this test indicates the 20 mile per hour speed limit does affect the landowners that have docks or watercraft on the waterway but did not prove the boaters were causing undue erosion problems in the area. From the confluence of the two waterways, Little Deer Creek extends approx. 8000 feet and Deer Creek extends approx. 13000 feet. The vast majority of the residences are located nearer to the confluence of the two waterways. Major Hensley does not feel banning the fishing tournaments is the preferred solution to the dilemma. Stopping the fishing tournaments would not stop any other boater from traveling at 20 miles per hour through the same area without amendment to the existing rule.

As mentioned earlier in the report, Major Hensley did not see erosion problems that could be attributed directly to boats traveling at greater than idle speed. The area appeared to have erosion typically expected on an Ohio River tributary that is prone to high water conditions. Erosion on the outside bends of these type waterways is common and expected.

### **Recommendation**

After taking these factors into consideration, the committee appointed to examine this petition makes the following recommendation: extend the current idle zone on Deer Creek from 600 feet to 2500 feet and extend the current idle zone on Little Deer Creek from 300 feet to 2500 feet. Extending the idle zones to 2500 feet would place the petitioner and other concerned property owner's residence within the idle zone on Little Deer Creek and it would extend the idle zone on Deer Creek to a point where the largest concentration of residences would fall within the area created by the idle zone.

### Current Rule

#### **312 IAC 5-7-6 Deer Creek and its tributaries, Perry County**

Authority: IC 14-10-2-4; IC 14-11-2-1; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14

Sec. 6. (a) A person must not operate a watercraft on Deer Creek or its tributaries in Perry County in excess of twenty (20) miles per hour.

(b) In addition to the restrictions established under subsection (a), a person must not operate a watercraft in excess of idle

speed:

(1) on Deer Creek:

(A) from its mouth on the Ohio River to buoys placed six hundred (600) feet upstream from the confluence of Deer

Creek with Little Deer Creek; or

(B) between buoys placed three hundred (300) feet downstream and three hundred (300) feet upstream of the State Road

66 bridge in section 5, township 7 south, range 2 west; and

(2) on Little Deer Creek to buoys placed three hundred (300) feet upstream from the confluence of Deer Creek with Little Deer

Creek.

*(Natural Resources Commission; 312 IAC 5-7-6; filed Mar 23, 2001, 2:50 p.m.: 24 IR 2375, eff Jan 1, 2002; readopted filed May*

*29, 2008, 1:53 p.m.: 20080625-IR-312080057RFA)*

### Proposed Rule

#### **312 IAC 5-7-6 Deer Creek and its tributaries, Perry County**

Authority: IC 14-10-2-4; IC 14-11-2-1; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14

Sec. 6. (a) A person must not operate a watercraft on Deer Creek or its tributaries in Perry County in excess of twenty (20) miles per hour.

(b) In addition to the restrictions established under subsection (a), a person must not operate a watercraft in excess of idle

speed:

(1) on Deer Creek:

(A) from its mouth on the Ohio River to buoys placed **twenty five hundred feet (2500)** upstream from the confluence of Deer

Creek with Little Deer Creek; to a point at **(UTM 4197262.1 North) (SPC 974300.7 North)** and **(UTM 529318.5 East) ( SPC 3073012.8 East)**, or

(B) between buoys placed three hundred (300) feet downstream and three hundred (300) feet upstream of the State Road  
66 bridge in section 5, township 7 south, range 2 west; and  
(2) on Little Deer Creek to buoys placed **twenty five hundred feet (2500)** upstream from the confluence of Deer Creek with Little Deer  
Creek at a point at **(UTM 4197178.0 North) (SPC 974022.4 North) and (UTM 528463.5 East) (SPC 3070206.8)**





## Exhibit B



## Exhibit C

### TITLE 312 NATURAL RESOURCES COMMISSION

#### Final Rule

LSA Document #09-210(F)

#### DIGEST

Amends 312 IAC 5-7-6 to establish a revised idle zone on Deer Creek in Perry County. Effective 30 days after filing with the Publisher.

#### 312 IAC 5-7-6

SECTION 1. 312 IAC 5-7-6 IS AMENDED TO READ AS FOLLOWS:

#### 312 IAC 5-7-6 Deer Creek and its tributaries, Perry County

Authority: IC 14-10-2-4; IC 14-11-2-1; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14

Sec. 6. (a) A person must not operate a boat on Deer Creek or its tributaries in Perry County in excess of twenty (20) miles per hour.

(b) In addition to the restrictions established under subsection (a), a person must not operate a boat in excess of idle speed:

(1) on Deer Creek:

(A) from its mouth on the Ohio River to buoys placed ~~six~~ **two thousand five** hundred ~~(600)~~ **(2,500)** feet upstream from the confluence of Deer Creek with Little Deer Creek, **UTM 4197262.1 North (SPC 974300.7 North) and UTM 529318.5 East (SPC 3073012.8 East);** or

(B) between buoys placed three hundred (300) feet downstream, **UTM 4198026.3 North (SPC 937498.0 North) and UTM 530160.7 East (SPC 297732.7 East),** and three hundred (300) feet upstream, **UTM 4198200.8 North (SPC 937531.6 North) and UTM 530194.5 East (SPC 297907.3 East),** of the State Road 66 bridge in section 5, township 7 south, range 2 west; and

(2) on Little Deer Creek to buoys placed ~~three~~ **three thousand two** hundred ~~(300)~~ **(3,200)** feet upstream from the confluence of Deer Creek with Little Deer Creek, **UTM 4197310.5 North (SPC 974433.4 North) and UTM 528218.8 East (SPC 3069394.3 East).**

*(Natural Resources Commission; 312 IAC 5-7-6; filed Mar 23, 2001, 2:50 p.m.: 24 IR 2375, eff Jan 1, 2002; readopted filed May 29, 2008, 1:53 p.m.: 20080625-IR-312080057RFA; errata filed Jun 2, 2009, 10:29 a.m.: 20090624-IR-312090386ACA)*